UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 12

20/20 COMMUNICATIONS, INC., Respondent, **and** **CHARLES SMITH, an Individual,** Charging Party.	**CASE NO. 12-CA-165320**

RESPONDENT'S RESPONSE TO THE ORDER TO SHOW CAUSE

Respondent, 20/20 COMMUNICATIONS, INC., responds to the Order to Show Cause issued by the National Labor Relations Board ("NLRB" or "Board") on December 3, 2018. The Order directed the parties to show cause as to why this case should not be remanded to Administrative Law Judge ("ALJ") for further proceedings consistent with the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017) (hereinafter "*Boeing*"). As explained below, Respondent submits that *Boeing* does not require remand to the ALJ to determine whether Respondent's MAA independent violated Section 8(a)(1) of the Act because it interferes with employees ability to access the Board. *Boeing* is a purely legal test that does not require additional findings of fact before the ALJ. The record is already sufficiently developed. Accordingly, the Board can make the determination and when applying the *Boeing* standard to the established facts it should properly find the Mutual Arbitration Agreement ("MAA") did not interfer with employees' access to the board because such a finding would not have been supported by the facts this case.

BACKGROUND

On December 3, 2015, Charging Party filed an unfair labor practice charge against the Respondent alleging, *inter alia*, that Respondent sought to enforce a waiver of the right to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b), against various employees and in violation of the NLRB decisions *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

On September 6, 2016, the ALJ issued a Decision[1] in the above-captioned case finding Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a MAA requiring employees to resolve employment-related disputes exclusively through individual arbitration, and to forego any right they have to resolve such disputes through class or collective action.

On October 4, 2016, counsel for the General Counsel filed Exceptions to the ALJD, specifically alleging that the ALJ erred in failing to find that the Respondent's MAA interfered with employee access to the Board. On October 4, 2016, Respondent also filed Exceptions to the ALJ, arguing that the ALJ erroneously found that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement by requiring employees to resolve employment-related disputes exclusively through individual arbitration, and forgo any right they have to resolve such disputes through class or collective action. Respondent also argued that the ALJ failed to defer to the federal district courts' finding that the MAA is enforceable under the Act. On October 18, 2016, Respondent filed its Response to the General Counsel's Exceptions to the ALJ.

On December 3, 2018, the NLRB issued a Decision finding that:

[1] The Administrative Law Judge's decision is cited as "ALJD" followed by the appropriate page and line numbers.

> At the time of the judge's decision and the General Counsel's exceptions, the issue whether maintenance of a work rule or policy that did not expressly restrict employee access to the Board violated Section 8(a)(1) on the basis that employees would reasonably believe it did would be resolved based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's maintenance of a facially neutral work rule would be unlawful "if employees would reasonably construe the language to prohibit Section 7 activity." *Id.* at 647. Recently, the Board overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 16-18 (2017).

(Order, Para. 2). Accordingly, the NLRB issued an order to show cause for why the "allegation that the MAA unlawfully restricts employee access to the Board should not be remanded to the judge for further proceedings in light of Boeing." (Order, Para. 2).

ARGUMENT

In *Boeing*, the Board established a new standard governing the validity of employer rules under the National Labor Relations Act (the "Act"). Under that new standard, when evaluating the legality of an employer rule, the Board must consider: (1) the nature and extent of the potential impact of the rule or policy upon Section 7 rights, and (2) the legitimate justifications associated with the rule. *See Boeing*, slip op. at 2–3. To clarify this new test, the Board also described three "categories" of work rules to be evaluated under *Boeing*.

So-called "Category 1" rules are those which are lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. *See Boeing*, slip op. at 4. "Category 2" rules are those warranting individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. *Id.* Lastly, "Category 3" rules are those which are unlawful to maintain because they would prohibit or limit NLRA-protected activity, and the adverse impact

on NLRA rights is not outweighed by justifications associated with the rule, such as a work rule prohibiting employees from discussing wages or benefits. *Id.*

Boeing does not necessitate remanding this case to the NLRB division of Judges because, *Boeing* is a purely legal test that does not require additional findings of fact before the ALJ. Accordingly, the Board has routinely refrained from remanding cases that were similarly decided under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), for further proceedings consistent with *Boeing*, and instead simply addressed the merits under its new legal standard. *See, e.g.*, *Imagefirst Laundry & Distribution*, 366 NLRB No. 182, slip op. at 1, n.3 (2018); *see also Long Beach Mem'l Med. Ctr.*, 366 NLRB No. 66 (2018). This matter should not be handled any differently.

The record in this case is already sufficiently developed and supports a finding that, even under *Boeing*, no employee could reasonably misinterpret the MAA as prohibiting Section 7 activity, including the filing of unfair labor practice charges with the Board. *See, e.g.*, *Tiffany & Co.*, 200 L.R.R.M. (BNA) ¶ 2069 (NLRB Div. of Judges Aug. 5, 2014) (finding a confidentiality clause lawful when it expressly excluded protected concerted activity from its coverage).

The MAA clearly falls into category 1 which is lawful to maintain because (1) it is not reasonable to conclude that they interfere with Section 7 rights; (2) even if it would have a potential adverse impact on protected rights the Respondent's justifications outweighs any potential effect on Section 7 rights; and (3) the MAA has not been applied to interfere with Section 7 rights.

The MAA when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights. Indeed, the MAA expressly advises employees it does ***not*** apply to their filing complaints with federal or state agencies. The MAA explicitly states:

> 6. (. . .) **Employee will not be disciplined, discharged, or otherwise retaliated against for exercising his or her rights under Section 7 of the National Labor Relations Act.**

(Joint Ex. 2, ¶6).

The MAA also states:

> 2. (. . .) Additionally, by agreeing to submit the described claims to binding arbitration, Employee **does not waive his or her right to file an administrative complaint with the appropriate administrative agency** (e.g., the Equal Employment Opportunity Commission or state agencies of a similar nature), but does knowingly and voluntarily waive the right to file, or seek or obtain relief in, a civil action of any nature seeking recovery of money damages or injunctive relief against Employer, except as described above.

(Joint Ex. 2, ¶2). This language makes expressly clear to employees that they may file complaints with governmental agencies, including the NLRB.

The ALJ did not find any evidence that any employee has ever misinterpreted the MAA as prohibiting his or her filing claims with the Board or any other federal, state, or municipal government agency. To the contrary, the fact that Charging Party Smith has successfully filed a charge and amended his charge with the NLRB refutes the government's theory and speculation that the challenged policy has some improper "chilling effect" and would restrict the exercise of Section 7 activity.

The Fifth Circuit made clear that it would ***not*** be reasonable for employees to read an arbitration agreement like the MAA as prohibiting them from filing charges with the Board where the agreement states explicitly that it does not do so. The Court explained:

> Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite.

Murphy Oil, 2015 WL 6457613, at *5.

Here, the MAA explicitly states that it does ***not*** apply to employees' "right to file claims with federal, state or municipal government agencies." (Joint Ex. 2I at p. 55) (emphasis added). Because the MAA says it does ***not*** apply to such claims, which would include unfair labor practice charges filed with the Board, it would be unreasonable for employees to read the MAA otherwise.

Furthermore, under Boeing, the Board established a "balancing test," whereby, when evaluating the lawfulness of facially neutral workplace rules the Board will consider the employer's justification for the contested rule and weigh that justification against the potential impact of the rule, as reasonably interpreted, on employees' Section 7 rights. Boeing, slip op at 3, 15. Thus, the Board now endeavors to strike the proper balance between the invasion of employee rights protected by the Act and the asserted business justifications for the rules. Id. The MAA in this case is not only neutral but in fact specifically ensures that the right to file a charge with agencies such as the NLRB is maintained. Furthermore, there is a legitimate business justification for arbitration. Unlike, in court cases, arbitration matters can be resolved in a speedy manner and with more flexibility and less strict procedural rules.

CONCLUSION

For the reasons stated above, the Board need not, and should not remand this matter to the Division of Judges for further proceedings consistent with the NLRB's decision in *Boeing*.

Respectfully submitted this January 4, 2019.

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STATEMENT OF SERVICE

The undersigned certifies that on January 4, 2019, a copy of the foregoing Response of the Respondent 20/20 COMMUNICATIONS, INC. to the Order to Show Cause has been filed via electronic filing with:

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